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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~1886~~

SOUTHERN RAILWAY COMPANY,
Petitioner,

versus

ROBERT B. TROUTMAN, JR.,
Respondent.

On petition for writ of certiorari to the United States Court of Appeals, 5th Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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TABLE OF CONTENTS

Page

Statement of the Case 1

Argument 9

I. There is no justification for the writ 9

II. There was no improper use of influence 10

III. There was no contingent fee 16

Conclusion 18

TABLE OF AUTHORITIES

Cases:

Arrow Transp. Co. v. Cincinnati, N.O. & T.P. Ry. Co., 379 U.S. 642 (1965) 11

Baker v. Dillon, 389 F.2d 57 (5th Cir., 1968) 18

Beard v. Westmoreland, 90 Ga.App. 632, 94 S.E. 2d 93 17

Black Industries v. Bush, 110 F. Supp. 801 (D., N.J. 1953) 15

Bradley v. American Radiator & Standard Sanitary Corp., 6 FRD 37 (S.D., N. Y., 1946) 15

Campbell County v. Howard, 133 Va. 19, 112 S.E. 876 17

Cary v. Neal, 54 Ga.App. 860, 189 S.E. 575 13

Coyne v. Superior Incinerator Co. of Texas, 80 F.2d 844 (2nd Cir., 1936) 15

Denver v. New York Trust Co., 229 U.S. 123, 133 (1913) 9

Ewing v. National Airport Corp., 115 F.2d 859 (4th Cir., 1940) 14

AUTHORITIES (Continued)

Page

Forsyth v. Hammond, 166 U.S. 506, 514-515 (1897) 9

General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175, 178 (1938) 9

Gilchrist v. Harrah, 113 P.2d 712 (Cal.2d, 41) 16

Hall v. Anderson, 18 Wash.2d 625, 140 P2d 266, 148 ALR 760 13

Hamilton-Brown Shoe Co. v. Wolf Bros & Co., 240 U.S. 251, 258 (1916) 9

Magnum Import Co. v. Coty, 262 U.S. 159 (1923) 9

Moffett v. American Oil Co., 85 F.Supp. 174 (S.D., N.Y., 1949) 15

N.L.R.B. v. Waterman S.S. Co., 309 U.S. 206, 208 (1940) 9

Noble v. Mead-Morrison Mfg. Co., 237 Mass. 5, 1929 N.E. 669 13

Old Dominion Transportation Co. v. Hamilton, 146 Va. 594, 131 S.E. 850 14

Oscanyan v. Winchester Repeating Arms Co., 103 U.S. 261 (1881) 12

Providence Tool Co. v. Norris, 2 Wall. 45 (1865) 12

Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508 (1924) 10

Stanton v. Embrey, 93 U.S. 548 (1876) 13, 17

Steel v. Drummond, 275 U.S. 199, 205 (1927) 16

Trist v. Child, 88 U.S. 441, 451 ..... 12, 13

United States v. Johnston, 268 U.S. 220, 227 (1925) 9

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1970

No. 1886

SOUTHERN RAILWAY COMPANY,
Petitioner,

versus

ROBERT B. TROUTMAN, JR.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals, Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

The petitioner's Statement of the Case fails to give this Court a fair and impartial summary of the evidence sufficient for the Court properly to understand the issues. Thus, it is necessary that the respondent briefly but accurately supply the missing facts.

The respondent, a graduate of Harvard Law School, has been a practicing lawyer since 1941 (A. 148) and has been dependent on his law practice for ninety-five (95) per cent of his income. (A. 713). He first met Mr. Sim S. Wilbanks in 1962 when Mr. Wilbanks, rep-

resenting Southern Raiwlay Company, came to his law office to seek his assistance in helping Southern with the ICC in connection with its purchase of the Central of Georgia Railroad. (A. 173-75). After the successful completion of this matter, the respondent told Mr. Wilbanks that the Southern could settle its obligation with him "by joining with us to work out the air rights." (A. 180). The air rights owned by Mr. Troutman adjoined property owned by Southern and the Central of Georgia in Atlanta and in Mr. Troutman's opinion, a joint development of these air rights would have been mutually profitable to both parties. Thereafter, several fruitless conferences were held in this regard. (A. 181-82).

In July 1963, Mr. Troutman received a call from Mr. Wilbanks to set up another meeting in Mr. Troutman's law office, which took place about the middle of the month. (A. 182, 185). It was at that meeting that Mr. Wilbanks told him that the Southern "had an enormous problem" which had resulted from the Interstate Commerce Commission ordering an increase in grain freight rates which order, if allowed to stand, would result in the Southern losing a thirteen million dollar investment in Big John cars plus a tremendous loss of revenue in the future. (A. 185-88). Mr. Wilbanks explained to Mr. Troutman that the Southern was going to bring suit against the ICC because the order "violated the Interstate Commerce Commission Act," because the Commission "had gone beyond the powers that Congress had given it" and because the order was "against the national interest of this country." (A. 188-89).

Mr. Troutman testified that Mr. Wilbanks wanted him to present the matter to the President "to see if this was not truly against the national interest of this country." (A. 180). He categorically and emphatically denied being asked by Mr. Wilbanks to use personal or political influence to get the President to act for that reason, which Mr. Troutman would not "even have thought of doing." (A. 200, 249). After checking into the matter carefully, he concluded that Southern's position "had extreme merit in its favor" (A. 191, 196-99) and thereafter commenced his services.

There is little dispute with respect to what Mr. Troutman actually did in furtherance of Southern's request for his services. He had been furnished with material by Mr. Wilbanks initially and, according to Wilbanks, whenever Mr. Troutman would have a question "I'd send him something to answer it." (A. 491). Mr. Troutman conversed with the President several times, conversed several times with the President's Special Deputy Counsel, Myer Feldman (A. 204-05), did research at the Library of Congress and at the Census Bureau (A. 206-07) and conversed with the Georgia Commissioner of Agriculture and the United States Department of Agriculture, which department informed him that the reduction of grain rates "was in the national interest." (A. 210). The President wanted the reactions of certain congressmen (A. 214-15) and Mr. Troutman complied as best he could with that request. He studied the brief filed by the ICC in the Ohio suit to help him in his presentation of the case to the Department of Justice. (A. 226-27). At the suggestion of Mr. Feldman, he called Mr. Katzenbach, Deputy Attorney General,

who referred him to Mr. William Orrick of the Attorney General's office with whom he conferred several times and to whom he furnished material outlining the case in an attempt to convince him that the ICC had overstepped the law. (A. 229-30). He remained in almost daily contact with Mr. Wilbanks. (A. 519).

Mr. Feldman testified that the President was not familiar with the grain rate matter prior to Mr. Troutman's discussion of it with him and that the President asked him to look into it and to "report back to him on the merits of the case." (A. 638-39). Mr. Troutman gave Mr. Feldman material that would be helpful "in understanding the issues and in reaching a conclusion" and their discussions "dealt with what was in the best interest of (1) the United States and, (2), the Southern part of the United States, and, (3) the farm community." (A. 641-42). After carefully studying the matter Mr. Feldman reported to the President "that I thought the order would adversely affect the economy of the South and that therefore the ICC order was not appropriate in the national interest." (A. 645). Mr. Feldman made no effort to suggest to anyone in the Department of Justice what legal determination should be made in the matter; that determination was arrived at solely by the officials of that department. (A. 652).

Most significantly, Mr. Feldman swore that Mr. Troutman did not make any request of President Kennedy that he considered in any way improper (A. 653-54) and that he did not know of anything wrong with the facts concerning the grain rate case being brought to the attention of the President. (A. 652-53).

Mr. William Orrick, who was the member of the Department of Justice in charge of the matter, testified that his staff studied the legal questions and that the decision of the Department to file an answer in the Ohio litigation contrary to the position of the ICC was based entirely on the merits and was unaffected by any outside influence, including Mr. Troutman. (A. 659-60, 670).

Without objection, Mr. Orrick was permitted to testify that he was called upon from time to time by members of the Bar from the District of Columbia and various states for the purpose of presenting to him, as an Assistant Attorney General, the contentions, both legal, economic or otherwise, to support the position of those they were representing in cases in which the United States of America was a party, and that such activities come within the general scope of the performance of legal services for a party to a pending lawsuit. (A. 670).

The desired result — the filing of an answer by the Department of Justice supporting the position of the Southern — was accomplished on September 19, 1963. (A. 248-49). The next day, Wilbanks sent his "congratulations" and one week later wrote to "thank you again for the splendid work that you did in connection with our grain case. You did a masterful job for which we will always be grateful to you." (Pl's. Ex. 24, A. Vol. III, pp. 5-6; Pl's. Ex. 26, A. Vol. III, pp. 7-8). A few days later, Southern's President D. W. Brosnan

wrote to thank the plaintiff for his "tremendous help in connection with our grain case."[1]

Mr. Troutman's sworn denial of the use of personal or political influence[2] is *uncontradicted*. He did not even know Mr. Orrick (A. 249-50); he was not close to the Attorney General with whom he had clashed at a political convention. (A. 350).

When Mr. Wilbanks was asked whether he thought the President would have done what he did just because Mr. Troutman asked him, as compared to doing it on the merits, Mr. Wilbanks said that *"I think the President did it because Mr. Troutman asked him, and* the *merits* were *on our side."* (A. 538-39). Mr. Wilbanks further testified that he knew if Mr. Troutman went to the White House that he stood in such high regard with the President that the President would listen to

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[1] Mr. Brosnan wrote further that "From every standpoint, moral or otherwise, it is only right that these low freight rates be permitted to stay in effect with great benefit to the people of Georgia and of all the Southeast." (Pl's. Ex. 25, A. Vol. III, pp. 6-7)

[2] "Q. Mr. Troutman, I want to ask you if at any time during the contacts that you had had with the President of the United States, President John F. Kennedy, as you have related them to this jury, did you ever ask President Kennedy to act in this matter as a personal or political favor —

A. I did not.

Q. — to you?

A. I did not.

Q. In presenting the facts to him, did you ever present them on any basis other than the merits of the case?

A. I did not. And I wouldn't even have thought of doing it.

Q. Would you have thought of asking the President of the United States to do you a personal or political favor in this matter?

A. I would not have." (A. 249).

him and that the material he gave Mr. Troutman could be used to persuade the President that the Southern was right. (A. 562).

There was no formal written agreement with respect to the services Mr. Troutman was to perform nor was there any formal fee arrangement. However, when the Justice Department's answer was filed, Mr. Wilbanks came to Mr. Troutman and asked "what could he do for me," and Mr. Troutman responded that the "account could be settled by Southern joining with us to develop the air rights." (A. 261). Mr. Wilbanks' testimony was that there was to be no compensation. (A. 488). He testified in substance that he had agreed to help Mr. Troutman by bringing to the attention of Mr. Brosnan Mr. Troutman's desire for a joint development of the air rights properties and that he had brought that matter to Mr. Brosnan's attention. It was brought out on cross examination, however, that Mr. Brosnan had testified in his deposition, taken in the presence of Mr. Wilbanks, that Mr. Wilbanks had never said anything to him about Southern's participation in the air rights project subsequent to November 8, 1962 (prior to the grain rate matter) and that he, Mr. Brosnan, would have remembered any such thing as that "if Mr. Wilbanks had brought it up, and he did not bring it up." (A. 568-70). Efforts to work out the joint development of the air rights were continued by Mr. Troutman for several years, but when it became evident that the Southern would not join in as Mr. Troutman had been led to believe, the plaintiff informed the defendant that the account would have to be settled in the "usual" manner by payment of

money. (A. 296) .The plaintiff discussed with Mr. Brosnan the fact that he expected to be paid. (A. 420). "Mr. Brosnan knew that I expected a compensation in the matter" and "Mr. Wilbanks knew that I expected compensation." (A. 425).

Mr. Troutman valued his services at $175,000.00 (A. 307). Three members of the Atlanta Bar valued the services as being worth from $195,000.00 to $260,000.00. (A. 464, 468, 726). The defendant did not offer any rebutting testimony.

Final proof that the position of the Justice Department was based on the merits of the case and not on personal or political influence came when the United States Supreme Court upheld the striking down of the ICC Order. (A. 276). Mr. Brosnan, Southern's President, again expressed his appreciation to Mr. Troutman for his services as he had done when the Justice Department filed its answer.[3]

Had the ICC order been allowed to remain in effect, the Southern's investment in "Big John" cars of more than twelve million dollars would have been lost. (A. 552). The revenue which would be lost was projected at "hundreds of thousands of dollars per month, millions of dollars per year." (A. 552). Primarily because of the successful results of the Ohio litigation, precipi-

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[3] "We are, of course, quite happy at the decision and *I want to thank you again for your fine efforts which did so much to bring it about. Your assistance and interest will always be remembered* and *appreciated,* I assure you." (Pl's. Ex. 31, A. Vol. III, p. 13).

tated to a very large extent by Mr. Troutman's services, as admitted by Southern's President (Note 3, *supra*), Southern began a period of prosperity. (A. 554). *In one year alone (1966), Southern's operating revenues increased by over twenty-one million dollars.*

ARGUMENT

I. There Is No Justification For The Writ

Jurisdiction to bring up cases by writs of certiorari from circuit courts was conferred upon the Supreme Court for two purposes: (1) secure uniformity of decisions between those courts in the nine circuits, and (2) to bring up questions of unusual importance which it is in the public interest to have decided by a court of last resort. *Magnum Import Co. v. Coty*, 262 U.S. 159 (1923). It is to be exercised sparingly, and when invoked for reviewing a question of importance, should not be exercised unless the question is of peculiar importance. See, *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *Forsyth v. Hammond*, 166 U.S. 506, 514-515 (1897); see also *Denver v. New York Trust Co.*, 229 U.S. 123, 133 (1913).

The Supreme Court does not grant certiorari solely to review judgments based solely on questions of fact, to review the evidence and discuss specific facts or to review the inferences drawn from the evidence. *N.L.R.B. v. Waterman S.S. Co.*, 309 U.S. 206, 208 (1940); *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175, 178 (1938); *United States v. Johnston*,

268 U.S. 220, 227 (1925); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508 (1924).

Tested by these rules, it is clear that this Court's jurisdiction should not be invoked. The rulings below respecting the use of personal or political influence to procure governmental action are in complete accord with decisions by this and other federal courts as well as state courts. The argument that there was a contingent fee, which is being raised here for the firt time, involves only a failure to charge a technical point respecting the measure of recovery, which is not of sufficient gravity to be considered by this Court.

II. There Was No Improper Use of Influence

When Mr. Troutman was forced to file suit to recover compensation for valuable services rendered, the Southern for the first time urged that it had entered into a contract that was void as being contrary to public policy. Petitioner contended that it had asked Mr. Troutman to bring personal and political influence to bear upon the President of the United States.

This defense was first considered and rejected by the trial court which denied petitioner's motion for summary judgment. Petitioner sought without success to prove the illegal use of influence during the trial. The jury was instructed that "it is illegal to agree for hire to bring personal or political influence to bear on a public official, and to seek action or a decision from him on the basis thereof, when it's done irrespective of and without regard to the merits of the

case." (A. 774-75). The jury found from the evidence that there was no such illegality. This finding was approved by the trial court and subsequently by the Circuit Court.

By the very question posed by petitioner,[4] it is clear that even it has finally abandoned its original argument. The asking of the very narrow question admits that respondent was *not* hired to bring pressure to bear upon the President. It further admits that there was in fact *no* personal or political influence used to bring about the desired result. Admitted also is the fact that the position taken by the Justice Department was based purely and simply upon the merits, having in mind the welfare and best interest of the public.

In the present posture of the case, there is no suggestion that anything sinister, underhanded or detrimental to the public was considered or done.[5]

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[4]The Circuit Court held that while a contract contemplating the use of personal or political influence to influence a public official is void, nevertheless it is permissible for one to employ an agent or attorney to use his influence to gain access to a public official for the purpose of fairly presenting the merits of his client's case. Petition for Writ of Certiorari; p. 4a.
The petitioner seeks a determination that the mere use of influence to obtain an opportunity to present the merits of a matter of great public importance is illegal.

[5]As rather conclusive proof that the merits of the matter were in favor of petitioner, the Court's attention is directed to its own approval thereof. See *Arrow Transp. Co. v. Cincinnati, N.O. & T.P. Co.*, 379 U.S. 642 (1965). Indeed, petitioner has steadfastly maintained that the reduction of grain freight rates would be of tremendous benefit to the public and especially the southeastern states.
Furthermore, Mr. Troutman swore that he was not asked to procure favorable action by the use of influence. (A. 200, 249). There is no hint of the actual use of influence contained in the transcript.

On the pretext of having this Court enforce long-standing principles prohibiting the sale of influence to procure or control official action, petitioner is actually seeking to deny private citizens of their right to be heard on the merits of their position through a prominent and well-respected attorney.

The rule to be gleaned from the reported authorities is summed up by Circuit Court as follows:

> "It is of course true that a contract to influence a public official in the exercise of his duties is illegal and unenforceable when that contract contemplates the use of personal or political influence rather than an appeal to the judgment of the official on the merits of the case."[6]

The leading cases relied on by petitioner[7] do not proscribe the hiring of an attorney who possesses personal or political influence, for indeed such a rule could destroy the livelihood of some of our country's leading advocates. What is prohibited is the use of such influence alone to achieve a given result in disregard of the merits and the public interest.

Every citizen has the right through an agent to be heard before any department or official of govern-

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[6]Pet. for Writ of Certiorari, 4a

[7]*Trist v. Child*, 88 U.S. 441, 451; *Oscanyan v. Winchester Repeating Arms Co.*, 103 U.S. 261 (1881); *Providence Tool Co. v. Norris*, 2 Wall. 45 (1865)

ment.[8] Professional services to prepare and advocate just claims or other matters against the government for compensation are as legitimate as services rendered in court. See *Trist v. Child*, 88 U.S. 441 and *Stanton v. Embrey*, 93 U.S. 548 (1876). Part of an attorney's duty to his client is to "urge and persuade" which necessarily involves some personal influence.[9]

There is no doubt that the services actually rendered by respondent were those customarily furnished by an attorney to his client and sanctioned by the above authorities.

President Kennedy's Special Deputy Counsel, Myer Feldman, swore that there was nothing improper in Mr. Troutman presenting the matter to the President (A. 652-54). Deputy Attorney General William Orrick testified that he was called on from time to time by attorneys for the purpose of presenting data in support of their client's positions and that such activities came within the general scope of the performance of legal services. (A. 670). Senator Herman Talmadge and local attorney Hamilton Lokey both testified that his services were those routinely furnished by attorneys for clients. (A. 599-600, 723-25). Petitioner itself has impliedly if not expressly recognized that Mr. Troutman was hired to perform purely legal services rather than to use influence.[10]

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[8] *Cary v. Neal*, 54 Ga.App. 860, 189 S.E. 575. Such activity carried on openly and straight forwardly by an attorney is proper basis for compensation, See *Noble v. Mead-Morrison Mfg.*, 237 Mass. 5, 129 N.E. 669.

[9] See *Hall v. Anderson*, 18 Wash.2d 625, 140 P2d 266, 148 ALR 760.

[10] Former Georgia Governor Ernest Vandiver was paid by petitioner

Perhaps the leading state case on the question is *Old Dominion Transportation Co. v. Hamilton*, 146 Va. 594, 131 S.E. 850. The plaintiff was employed to secure the cancellation of a lease from the City of New York. For the purpose of getting to see the Mayor, he armed himself with letters of introduction from influential politicians, without which "he would no more have had a chance to present his case to the Mayor of New York City, than he would have had to secure an audience with the Dalai Lama." The following appears at p. 857:

> "On the other hand, even if the jury believed from the evidence that either personal or political influence was exerted by the plaintiff, but *merely to secure a hearing from the city authorities, and an opportunity to present the matter in issue upon its merits, and that when such opportunity was secured the case was presented upon its merits alone*, then in that event the jury should have been told that the plaintiff was entitled to a judgment." [Emphasis added]

That decision has never been overturned or criticized, either by another state court or a federal court. On the contrary, it was cited approvingly in *Ewing v. National Airport Corp.*, 115 F.2d 859 (4th Cir., 1940),

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for identical activities by a voucher marked for 'legal services.", (A. 503-05, 742-48).

and *Bradley v. American Radiator & Standard Sanitary Corp.*, 6 FRD 37 (S.D., N.Y., 1946).

The only federal court to comment specifically on the use of influence to secure a hearing is *Coyne v. Superior Incinerator Co. of Texas*, 80 F.2d 844 (2nd Cir., 1936).[11] Coyne had no expertise in selling incinerator plants but *he did have an acquaintance with public officials which would get him a hearing at least.* The possibility which this influence afforded to exercise improper pressure, in absence of proof of its use, was not enough to relieve defendant of its obligation to pay for services rendered (which, incidentally, was based on a percentage of the selling price).[12]

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[11]The petitioner has implied that this question was also involved in the district court decision in *Moffett v. American Oil Co.*, 85 F.Supp. 174 (S.D. N.Y., 1949). A casual reading of that case reveals that the decision turned on the question of a lack of proof by plaintiff that his activities produced the claimed result. By way of dicta, the trial court concluded that the plaintiff was a *matter of fact* seeking a favor by means of personal influence irrespective of the merits. (This very question was resolved by the jury in favor of Mr. Troutman). At no point in its decision did the district court proscribe the use of influence solely to obtain the chance to present the merits.

The only time the *Moffett* public policy discussion has been cited by any other court was in *Black Industries v. Bush*, 110 F.Supp. 801 (D., N.J., 1953) wherein it was held to be inapplicable.

[12]The Second Circuit noted that "only when the paramount public interest requires it will a party who has received the benefit of the performance of a contract be permitted to say that the obligations he assumed are not binding because illegal." (P. 845). As in the instant case, Coyne's contract required him to do no more than to present his principal's case on the merits, nor did the proof show that he did more.

Also in point is the case of *Gilchrist v. Harrah,* 113 P.2d 712 (Cal.2d, 41). There, the plaintiff's attorney had personal influence via close friendship with certain government officials which helped him get a public hearing of his client's problem. Noting that there was nothing secretive or underhanded, and that the merits of the matter were presented, the court refused to relieve the defendant of his obligation to pay for the legal services rendered by the plaintiff.

The courts have purposely left the meaning of the phrase "public policy" loose and free of definition (*Steel v. Drummond,* 275 U.S. 199, 205 (1927)), leaving to the jury under broad general rules the question of the validity of the specific contract in dispute. By denying the writ, this Court will leave undisturbed the principle that freedom of contract must not be lightly interfered with and yet preserve the rule voiding agreements to control the exercise of governmental action to the detriment of the public interest.

III. There Was No Contingent Fee

Demonstrating the ambivalence which was characterized its theories throughout the history of this extended litigation, petitioner *for the first time*[13] contends that an otherwise valid contract to render legal services by presenting the merits of its position to the proper authorities was rendered invalid by the size

[13]Up until the filing of this petition, Southern had only complained of a failure to give a technical charge relating to the jury's consideration of the result and of the size of the verdict.

the verdict which, petitioner says, created a contingent fee.

Clearly, such an untenable position affords no basis for review by this Court. At no point did Mr. Troutman testify or infer that his compensation was to be controlled by his success or failure. Mr. Wilbanks' position from the outset was that there was to be no compensation, regardless of the outcome. The evidence as to the reasonable value of his services ranged from $175,000.00 to $260,000.00. (A. 307, 464, 468, 726). Petitioner elected not to present any evidence in this respect and thus should not be heard to complain.

The trial courts charge[14] made no reference to contingency of recovery but gave the correct rule by which the jury was to measure the recovery.[15] The petitioner made no exception to the charge as given. The Circuit Court made no reference to the point.

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[14]"In this regard, I charge you that if you find that Mr. Troutman is entitled to recover, he should be awarded the reasonable value of the services rendered. In determining the compensation to be awarded for the reasonable value of these services, you are to consider the amount and character of the services rendered by Mr. Troutman, if any; the responsibility imposed upon him by the task which he was to perform; the labor, time and trouble involved; the character and importance of the matter in which the services were rendered; the amount of the money or value of the property to be affected by the result which he was to obtain; and the professional skill and experience called for on the part of the plaintiff; and finally, Ladies and Gentlemen, you may consider the character and standing of the plaintiff in that profession." (A. 780).

[15]*Stanton v. Embrey*, 93 U.S. 548, 557 (1876); *Beard v. Westmoreland*, 90 Ga.App. 632, 94 S.E.2d 93; *Campbell County v. Howard*, 133 Va. 19, 112 S.E. 876; 7 CJS Attorney & Client §191.

The evil inherent in the use of contingent fee contract is the danger that the avarice of the agent may become overly inflamed by hope of a reward contingent upon success and graduated by the value ensuing to the client. This danger can only be present where, prior to rendering the services, there is such an agreement.

Petitioner's true complaint being that the verdict was excessive, which matter addresses itself to the sound discretion of the trial court,[16] no reason for the writ is shown.

CONCLUSION

There being no valid ground for invoking this Court's jurisdiction, it is requested that the writ be denied.

Respectfully submitted,

Allen E. Lockerman

3500 First National Bank Tower
Atlanta, Georgia 30303

[16] *Baker v. Dillon*, 389 F.2d 57 (5th Cir., 1968).

CERTIFICATE OF SERVICE

I do hereby certify that I have served a copy of the within and foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari on Petitioner by depositing a copy of same in the United States Mail with adequate postage affixed thereto, addressed to Earle B. May, Jr., Esq., Jones Bird & Howell, 4th Floor Haas-Howell Building, Atlanta, Georgia 30303 and Charles A. Horsky, 888 16th St., Washington, D.C. 20006.

This ____ day of July, 1971.

_____

Of Counsel for Respondent